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Passing the Buck: An Analysis of *State v. Franco*, 257 Neb. 15, 594 N.W.2d 633 (1999), and Nebraska's Civil Forfeiture Law

Jason R. Humke
University of Nebraska College of Law, jhumke@co.lake.il.us

Note*

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TABLE OF CONTENTS

I. INTRODUCTION

On June 5, 2000, a young African-American businessman named Jacob King was waiting to catch a plane at Eppley Airfield in Omaha, Nebraska.[1] King was planning on flying from Omaha to Phoenix to purchase a car for his car cleaning and detailing business. He had decided to purchase the car with cash so that he would not have to wait for a check to clear from an out-of-state bank. When King went to the Southwest Airlines desk at Eppley Airfield, he paid cash for his ticket. He was then immediately questioned by a sheriff's deputy who

* Jason R. Humke, B.A. 2002, University of Northern Iowa; J.D. 2005, University of Nebraska College of Law.

1. The following story was taken from *ACLU of Nebraska Wins "Flying While Black" Case*, AMERICAN CIVIL LIBERTIES UNION, May 2, 2001, *at* http://www.aclu.org/RacialEquality/RacialEquality.cfm?ID=7244&c=133.

worked at the airport. The deputy asked whether King had a large amount of cash with him. When King told him that he was carrying approximately $7,000, the deputy took King's money into another room and had it sniffed by a drug dog. When the deputy returned, he told King that the drug dog had detected the odor of narcotics on the money.[2] The deputy then told King that his money was being seized on the suspicion that it had been utilized in drug trafficking. His money was seized through a process known as civil forfeiture, where property is "condemned" and then taken by the State. King, however, was not arrested by the deputy and he was never charged with a crime.

King went to the Nebraska branch of the American Civil Liberties Union ("ACLU") to seek legal assistance in getting his money returned to him. The ACLU chose to take the case primarily to challenge the use of racial profiling by police in airports to infer that black men with large amounts of money are drug couriers.

When the ACLU challenged the forfeiture, King learned that his money, which had been confiscated by a local sheriff, had been turned over to the federal government through a process known as "federal adoption." King and the ACLU had to challenge the forfeiture proceeding in federal court and meet the procedural requirements and burden of proof imposed upon claimants under the federal asset-forfeiture statutes. This placed King at a significant disadvantage, because the federal forfeiture proceedings lacked many of the procedural safeguards that were required in forfeiture proceedings brought under Ne-

2. The drug dog likely was set off simply because King was carrying a rather large amount of currency. This is because a high percentage of the currency in circulation has been contaminated by drug residue. For this reason, several Courts of Appeal have criticized the use of drug dog detections as the means of establishing probable cause that currency was utilized in drug transactions. *See, e.g.*, United States v. $242,484.00 in United States Currency, 351 F.3d 499, 511 (11th Cir. 2003) (noting that a drug dog's sniff of currency is "of little value" in determining whether the currency is used for narcotics trafficking because as much as eighty percent of all currency in circulation contains drug residue); United States v. $506,231 in United States Currency, 125 F.3d 442, 453 (7th Cir. 1997) (refusing to take seriously the results of a dog alert because a minimum of one-third—or as much as ninety-six percent—of currency in the United States is contaminated with drug residue) (citing cases and authorities); Muhammed v. DEA, 92 F.3d 648, 653 (8th Cir. 1996) (concluding that a dog alert is "virtually meaningless" because "an extremely high percentage of all cash in circulation in America today is contaminated with drug-residue"); United States v. $5,000 in U.S. Currency, 40 F.3d 846, 849–50 (6th Cir. 1994) (stating that the value of a dog alert is "minimal," because seventy to ninety-seven percent of currency in the United States is "so thoroughly corrupted" with cocaine contamination) (citing cases and authorities). *See also* Illinois v. Caballes, 125 S. Ct. 834, 839 (2005) (Souter, J., dissenting) (surveying judicial opinions that belie drug dogs' supposed infallibility and arguing that drug dogs often perform with "less than perfect accuracy").

braska law. In fact, under Nebraska's forfeiture statute,[3] there likely would have been insufficient evidence even to bring a forfeiture action against King's money.[4] Unfortunately, Nebraska's forfeiture statute, for all intents and purposes, no longer existed. Since the Nebraska Supreme Court's decision in *State v. Franco*,[5] drug-related civil forfeitures in this state have been brought almost exclusively under federal law. As Jacob King's story demonstrates, the *Franco* decision has had a profound impact on how civil forfeitures are pursued in Nebraska.

In Parts II and III, this Note will examine the reasoning behind the Nebraska Supreme Court's decision in *State v. Franco*, as well as the decision's effect on how forfeitures are now conducted within this state. Section III.B of this Note will then examine how the *Franco* decision intensified the practice of federal adoption and how that practice has allowed state law enforcement to circumvent Nebraska law. Finally, section III.C of this Note will propose an alternative to the current system that attempts to balance the concerns of civil libertarians with those of law enforcement.

II. BACKGROUND

A. Civil Forfeiture in the United States

In the United States, there are essentially two types of asset forfeiture proceedings that are utilized by the federal government: criminal forfeitures and civil forfeitures.[6] Criminal forfeitures, as the name suggests, are punitive sanctions brought against a defendant as part of a criminal proceeding.[7] Since these forfeitures are considered punitive, the Constitution requires the conviction of the defendant and proof beyond a reasonable doubt that the defendant's assets are subject to forfeiture.[8]

Civil forfeitures, in contrast, have minimal constitutional protections. These proceedings are brought *in rem* (against the property itself) under the legal fiction that the property itself committed a

3. NEB. REV. STAT. § 28-431 (Reissue 1995 & Cum. Supp. 2004).
4. This is because, under Nebraska law, the State is required to prove beyond a reasonable doubt that confiscated monies were used to facilitate drug trafficking. *See id.* § 28-431(4); *infra* section III.B.
5. 257 Neb. 15, 594 N.W.2d 633 (1999).
6. Evan Williford, *The Basics of Forfeiture: Testing the Limits of Constitutionality*, 14 CRIM. JUST. 26, 27–28 (2000). There is also a third type of proceeding entitled "administrative forfeiture," in which a law enforcement agency uses nonjudicial proceedings to confiscate unclaimed property. However, these proceedings are typically categorized as a type of civil forfeiture, since a civil proceeding may be brought if a claimant comes forward to contest the forfeiture. *See* Anthony G. Hall, *Q & A on Recovering the Proceeds of Crime / Forfeiting the Instrumentalities of Crime*, 42 ADVOC. 16 (1999).
7. *See* Williford, *supra* note 6.
8. *Id.*

crime.[9] Since the proceedings are brought *in rem*, there appears to be no constitutionally mandated burden of proof, and property owners do not even have to be charged with a crime.[10] The constitutionality of these proceedings is justified on the basis that the proceedings serve a remedial rather than a punitive purpose.[11]

The historical origin and evolution of civil forfeiture law in the United States has been thoroughly documented by numerous legal commentators, and duplicating their efforts would go beyond the scope of this Note.[12] However, a brief history of the origins of civil forfeiture would assist the reader in understanding this area of the law.

Historically, civil forfeiture proceedings were utilized in the United States as a means of enforcing the nation's custom laws.[13] The primary purpose of these early forfeiture statutes was to recover the revenue that was lost as a result of the rampant attempts to circumvent the federal custom laws during this period.[14] The use of *in rem* proceedings was necessary in early forfeiture cases predominantly as a means of establishing jurisdiction over property in situations where

9. Brant C. Hadaway, Comment, *Executive Privateers: A Discussion on Why the Civil Asset Forfeiture Reform Act Will Not Significantly Reform the Practice of Forfeiture*, 55 U. MIAMI L. REV. 81, 97–98 (2000).

10. *Id.*

11. *Id.*

12. For a more extensive historical analysis of the development of civil forfeiture law in the United States, see Stefan D. Cassella, *The Uniform Innocent Owner Defense to Civil Asset Forfeiture: The Civil Asset Forfeiture Reform Act of 2000 Creates a Uniform Innocent Owner Defense to Most Civil Forfeiture Cases Filed by the Federal Government*, 89 KY. L.J. 653, 656–58 (2000–2001); Barclay Thomas Johnson, *Restoring Civility—The Civil Asset Forfeiture Reform Act of 2000: Bay Steps Towards a More Civilized Civil Forfeiture System*, 35 IND. L. REV. 1045, 1047–48 (2002); David Pimentel, *Forfeiture Procedure in Federal Court: An Overview*, 183 F.R.D. 1, 3–5 (1999); Joel A. Beck, Comment, *The Per Se Rule of Civil Forfeiture of Money Found in "Close Proximity" to Controlled Substances*, 37 IDAHO L. REV. 641, 644–47 (2001); Eric N. Bergquist, Note, *Statutory In Rem Civil Forfeiture, The Punishment of Innocent Owners and the Excessive Fines Clause: An Analysis of* Bennis v. Michigan, *116 S. Ct. 994 (1996)*, 76 NEB. L. REV. 155, 156–62 (1997); Hadaway, *supra* note 9, at 88–92; Tamara R. Piety, Comment, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. MIAMI L. REV. 911, 916–18 (1991); David Benjamin Ross, Comment, *Civil Forfeiture: A Fiction That Offends Due Process*, 13 REGENT U. L. REV. 259, 260–64 (2000–2001); Alison Roberts Solomon, Comment, *Drugs and Money: How Successful is the Seizure and Forfeiture Program at Raising Revenue and Distributing Proceeds?*, 42 EMORY L.J. 1149, 1151–52 (1993).

13. *See* Austin v. United States, 509 U.S. 602, 613 (1993); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682–84 (1974).

14. Hadaway, *supra* note 9, at 89. *See also* C.J. Hendry Co. v. Moore, 318 U.S. 133, 137 (1943) (reasoning that the authority to commence proceedings *in rem* against vessels engaging in illegal conduct on navigable waters was inherited by the United States from the English law of Exchequer, which used forfeiture as a means of enforcing revenue collection).

the property owners were outside of the country.[15] However, the Supreme Court also made clear in these early cases that, for *in rem* proceedings, property could be confiscated without regard to the owner's participation in or knowledge of the illegal act that the property had been used to commit.[16]

During the 1920s Prohibition era, the use of civil forfeiture was expanded beyond the context of admiralty law to target the "instrumentalities" used to manufacture and distribute illegal liquor.[17] The Supreme Court applied its earlier forfeiture decisions in the admiralty context to the National Prohibition Act[18] and concluded that, based upon the nature of *in rem* proceedings, property owners could be forced to forfeit their property, even if they did not know their property was being used for illegal purposes.[19]

During the late 1970s and early 1980s, the focus of asset forfeitures shifted dramatically with the start of the war on drugs.[20] Today, the most widely used federal forfeiture statutes come from the Comprehensive Drug Abuse Prevention and Control Act, enacted by Congress in 1970.[21] A series of amendments to the drug-related forfeiture statutes created under this Act steadily increased the types of assets that were subject to forfeiture for drug-related offenses.[22] These subsequent amendments also gave the Department of Justice exclusive control over proceeds received from asset forfeitures, instead of placing the proceeds in the U.S. Treasury as previously had been required.[23] Through these subsequent amendments to the federal forfeiture statutes, the power of federal law enforcement to seize drug-

15. *See* Melissa A. Rolland, Comment, *Forfeiture Law, the Eighth Amendment's Excessive Fines Clause, and* United States v. Bajakajian, 74 NOTRE DAME L. REV. 1371, 1373–75 (1999).

16. *See* The Palmyra, 25 U.S. (12 Wheat.) 1, 14 (1827).

17. Cassella, *supra* note 12, at 656–57. *See also* Van Oster v. Kansas, 272 U.S. 465 (1926) (holding that the line of cases upholding civil forfeitures to enforce admiralty laws is applicable to forfeitures of the instrumentalities of bootlegging).

18. Pub. L. No. 66, 41 Stat. 305 (1919) (repealed 1933) (stating that conveyances of intoxicating liquors were subject to forfeiture).

19. *See, e.g.*, Waterloo Distilling Corp. v. United States, 282 U.S. 577, 581 (1931).

20. *See* Steven Wisotsky, *Crackdown: The Emerging 'Drug Exception' to the Bill of Rights*, 38 HASTINGS L.J. 889, 892–94 (1987).

21. Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified at 21 U.S.C. §§ 801–886 (2000)).

22. *See* Psychotropic Substances Act of 1978, Pub. L. 95-633, tit. 3, § 301(a), 92 Stat. 3768, 3777 (1978) (codified at 21 U.S.C. § 881(a)(6) (2000)) (expanding the range of forfeitable property to "moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance"); Comprehensive Crime Control Act of 1984, Pub. L. 98-473, tit. 2, § 306(a), 98 Stat. 2050, 2051, 2075 (codified at 21 U.S.C. § 881(a)(7) (2000)) (expanding the range of property subject to forfeiture to include real property).

23. *See* Comprehensive Crime Control Act of 1984, Pub. L. 98-473, tit. 2, § 310, 98 Stat. 2050, 2051, 2075 (codified at 28 U.S.C. § 524(c)(1) (2000)).

related assets and use those assets for their own purposes was greatly expanded. However, as is explained in section III.B *infra*, the amendment to the federal forfeiture statutes that would prove to have the greatest impact on civil forfeiture in the State of Nebraska was the 1984 provision that created the procedure known as "federal adoption."[24]

B. Civil Forfeiture in Nebraska Prior to *State v. Franco*

At the same time Congress was amending the federal forfeiture statutes in an effort to wage the war on drugs, Nebraska was taking action to reform its own civil forfeiture statute. In November 1984, Nebraska amended its constitution through a voter initiative to allow fifty percent of the funds received through drug-related forfeitures to be paid over to the "county drug law enforcement fund" for the county where the seizure was made.[25] Each county was required under this constitutional amendment to set up its own county drug law enforcement board to oversee the use of forfeiture proceeds for drug enforcement purposes.[26] The amendment required that the other fifty percent of assets seized from drug-related forfeitures be appropriated exclusively to the use and support of the common schools.[27] The clear purpose of this amendment was to allow state law enforcement to benefit from a portion of the assets seized from their counter-drug operations without giving the confiscating agency direct and total control over the use of these assets, as the federal statute allowed.[28] The amendment also reflected the intent of Nebraska citizens to allow the state's schools to share in the revenue from drug-related forfeitures.[29]

The following year, the Nebraska Legislature amended Nebraska's drug-related forfeiture statute, section 28-431 of the Nebraska Revised Statutes,[30] to enact the statutory changes called for in the constitutional amendment. The statute was also amended to bring it into conformity with the federal drug-related forfeiture statute by allowing law enforcement to confiscate large quantities of money believed to be connected to drug trafficking.[31] During the Judiciary Committee

24. *See infra* section III.B.
25. NEB. CONST. art. VII, § 5.
26. *Id. See also* NEB. REV. STAT. § 28-1439.03 (Reissue 1995) (detailing the requirements of the county drug law enforcement boards).
27. NEB. CONST. art. VII, § 5.
28. *Hearing on L.B. 77 Before the Comm. on the Judiciary*, 88th Leg., 1st Sess. 12–14 (Neb. 1983) [hereinafter *Hearing on L.B. 77*] (statement of Senator Carol McBride-Pirsch, co-sponsor of LB 77).
29. *Hearing on L.R. 2CA Before the Comm. on Constitutional Revision*, 88th Leg., 1st Sess. 3–4 (Neb. 1983) (statement of Senator Carol McBride-Pirsch, sponsor of LR 2CA).
30. NEB. REV. STAT. § 28-431 (Reissue 1995 & Cum. Supp. 2004).
31. *Hearing on L.B. 77*, *supra* note 28, at 13.

hearings on this legislation, the Committee emphasized the intent for section 28-431 to emulate the federal statute as much as possible.[32] However, the legislature chose to diverge from the federal statute on several key issues. For instance, section 28-431 does not allow forfeitures of real property, such as farms or homes.[33] Section 28-431 also requires a higher burden of proof than the federal statute to establish that confiscated property was involved in illegal drug trafficking.[34] As the legislative record of these amendments indicates, section 28-431's divergence from the federal forfeiture statute was largely based upon the policy judgments of the legislature and not based upon any intent to change the remedial purpose of the statute.[35] However, in *State v. Franco*,[36] the Nebraska Supreme Court used these discrepancies between the two statutes to conclude that the Nebraska Legislature intended forfeitures under section 28-431 to be criminal proceedings. As this Note will demonstrate, the Court's ruling effectively nullified Nebraska's forfeiture law.

C. *State v. Franco*

On December 21, 1997, Juan Franco Jr. was arrested by the Nebraska State Patrol for transporting a large amount of cocaine in his 1992 Chevrolet pickup.[37] On December 26, 1997, the Lancaster County Attorney's office filed a forfeiture action under section 28-431 against the pickup and the $2,190 that was found within it. The forfeiture action alleged that all of these items were used to facilitate drug trafficking in violation of Nebraska law,[38] and therefore, the property was properly subject to forfeiture.

On February 9, 1998, the Lancaster County Attorney's Office filed an information charging Juan Franco with possession of a controlled substance with intent to deliver.[39] The forfeiture proceeding was commenced against Franco on February 17, 1998 but was not concluded that day. The next day, Juan Franco's lawyers filed a plea in bar,

32. *Id.*

33. *See* NEB. REV. STAT. § 28-431.

34. *Compare id.* § 28-431(4) (requiring the State to prove case beyond a reasonable doubt), *with* 21 U.S.C. § 881 (2000) (requiring the government to prove case by a preponderance of the evidence).

35. *Hearing on L.B. 247 Before the Comm. on the Judiciary*, 89th Leg., 1st Sess. 97–100 (Neb. 1985) [hereinafter *Hearing on L.B. 247*] (statement of Senator Carol McBride-Pirsch, co-sponsor of LB 247) (describing the intended purpose of the legislation amending section 28-431).

36. 257 Neb. 15, 594 N.W.2d 633 (1999).

37. *Id.* at 17, 594 N.W.2d at 636.

38. Specifically, against NEB. REV. STAT. § 28-416 (Reissue 1995 & Cum. Supp. 2004).

39. *Franco*, 257 Neb. at 17, 594 N.W.2d at 636.

requesting that the criminal charges against Franco be dismissed for violating both the state and federal Double Jeopardy Clauses.[40]

State v. Franco[41] reached the Nebraska Supreme Court in 1999, four years after the United States Supreme Court decided *United States v. Ursery*.[42] In *Ursery*, the Supreme Court had held that forfeitures pursuant to the federal civil forfeiture statute were not punishment for purposes of the Double Jeopardy Clause.[43] The *Ursery* Court utilized a two-prong test to determine whether either the purpose or the effect of the federal forfeiture statute was such that the statute should be considered punitive for purposes of the Double Jeopardy Clause. Under the first prong of this test, the reviewing court must consider whether the legislature "intended the particular forfeiture to be a remedial civil sanction or a criminal penalty."[44] Under the second prong of the test, the court must determine "whether the forfeiture proceedings are so punitive in fact as to establish that they may not legitimately be viewed as civil in nature, despite any congressional intent to establish a civil remedial mechanism."[45]

During its analysis of Nebraska's section 28-431, the *Franco* court purported to follow the same two-prong test that was utilized in *Ursery*.[46] The *Franco* court started its analysis of section 28-431 under the first prong by noting that Nebraska's Double Jeopardy Clause had been interpreted as providing coextensive protection with the federal Eighth Amendment.[47] Therefore, the court determined that it should compare the Nebraska forfeiture statute to the federal forfeiture statute assessed in *Ursery*.[48]

After comparing the two forfeiture statutes, the *Franco* court found three reasons to distinguish *Ursery* and concluded that the Nebraska Legislature intended section 28-431 to create criminal forfeiture proceedings. First, the court compared the "label" affixed to the federal and Nebraska statutes. The court noted that the federal forfeiture statute was entitled "civil forfeiture," while section 28-431 was codified under Chapter 28 of the Nebraska Code, which was entitled "Crimes and Punishments."[49]

The *Franco* court also distinguished section 28-431 by relying on previous Nebraska cases that stated, in *dicta*, that forfeitures pursu-

40. *See id.* at 18, 594 N.W.2d at 636.
41. 257 Neb. 15, 594 N.W.2d 633.
42. 518 U.S. 267 (1996).
43. *Id.* at 292.
44. *Id.* at 268.
45. *Id.*
46. *Franco*, 257 Neb. at 19–20, 594 N.W.2d at 637–38.
47. *Id.* at 20, 594 N.W.2d at 638.
48. *See Franco*, 257 Neb. at 20–23, 594 N.W.2d at 638–40.
49. *Id.* at 21–22, 594 N.W.2d at 638.

ant to section 28-431 were "criminal in nature."[50] The court reasoned that the legislature had acquiesced to this interpretation of section 28-431 in these prior cases by failing to amend the statute to clearly demonstrate a contrary intent.[51]

Finally, the *Franco* court distinguished section 28-431 from the federal forfeiture statute by relying upon the different standard of proof required by the two statutes. The court concluded that, because section 28-431 required the State to prove beyond a reasonable doubt that property was subject to forfeiture, the legislature must have intended to create a criminal forfeiture statute.[52]

After determining that the legislature intended section 28-431 to create criminal forfeiture proceedings, the *Franco* court quickly concluded the Double Jeopardy Clause applied to the statute.[53] Applying the *Blockburger*[54] Test to the statute, the court held that forfeiture proceedings brought under section 28-431 and criminal narcotics proceedings brought under section 28-416[55] constituted the same offense for purposes of the Double Jeopardy Clause.[56] Since the court determined that Juan Franco Jr. was placed in jeopardy when the forfeiture proceeding was commenced against him, the Double Jeopardy Clause required that the subsequent criminal proceedings for narcotics possession had to be dismissed.[57]

III. ANALYSIS

A. Breaking Down *Franco*'s Holding

The Nebraska Supreme Court purported to apply the two-prong test announced in *Ursery* when it concluded that the legislature intended section 28-431 to be a criminal forfeiture statute; however, the court's application of this test was flawed for multiple reasons. First, the *Franco* court overemphasized the differences between the federal forfeiture statute and section 28-431 to support its conclusion that the legislature intended section 28-431 to be a criminal sanction. For in-

50. *Id.* at 23–24, 594 N.W.2d at 638–640.
51. *Id.* at 23, 594 N.W.2d at 639.
52. *Id.*
53. *Id.* at 24, 594 N.W.2d at 640.
54. The "*Blockburger* Test" or "Same Elements Test" refers to the Constitutional principle announced in *Blockburger v. United States*, 284 U.S. 299 (1932), where the Court said that two criminal punishments will be considered the same offense for purposes of the Double Jeopardy Clause if either offense can be proven by establishing all the elements of the other offense. Therefore, if two criminal statutes have the same elements, they are considered cumulative punishments that are barred by the Double Jeopardy Clause unless they are brought within the same criminal proceeding. *See* Missouri v. Hunter, 459 U.S. 359, 368 (1983).
55. NEB. REV. STAT. § 28-416 (Reissue 1995 & Cum. Supp. 2004).
56. *Franco*, 257 Neb. at 25–28, 594 N.W.2d at 640–42.
57. *Id.* at 28, 594 N.W.2d at 642.

stance, the court distinguished the federal and state forfeiture statutes by noting that section 28-431 was codified under the Nebraska Criminal Code, but the court erroneously relied upon this distinction as evidence of the legislature's intent. Under Nebraska law, the Nebraska Revisor of Statutes—not the legislature—is responsible for determining how legislative enactments are codified within the statute books.[58] Therefore, the location where a statute is codified does not indicate whether the legislature intended the statute to be civil or criminal. In earlier cases, the Nebraska Supreme Court appeared to recognize this fact by determining that other forfeiture statutes contained within Nebraska's criminal code were civil in nature.[59]

The *Franco* court's reliance on where section 28-431 was codified also demonstrates that the *Franco* court ignored the U.S. Supreme Court's guidance on how to apply the first prong of the test utilized in *Ursery*. In *United States v. One Assortment of 89 Firearms*,[60] an earlier forfeiture case where the Supreme Court applied this two-prong test, the Court specifically rejected the "label argument" relied upon by the *Franco* court.[61] In fact, in *89 Firearms*, the Supreme Court determined that a forfeiture provision was civil, even though the authorizing statute was contained within a criminal law.[62]

The U.S. Supreme Court also indicated that ascertaining legislative intent required an examination of "'the procedural mechanisms [the legislature] established for enforcing forfeitures under the statute,'" rather than merely examining the title that was given to the statute.[63] The *Ursery* Court itself only mentioned the title of the federal forfeiture statute it was examining in passing as it listed the various procedural mechanisms within the statute that indicated the legislature's intent to create a civil forfeiture proceeding.[64]

In contrast, the *Franco* court largely appeared to ignore the procedural mechanisms within section 28-431 that indicated it was a civil forfeiture statute. For instance, section 28-431 (like the federal stat-

58. *See* NEB. REV. STAT. §§ 49-702, -705, -805 (Reissue 2004). This argument was first raised in the State of Nebraska's Petition for Writ of Certiorari to the United States Supreme Court following the Nebraska Supreme Court's decision in *Franco*. *See* Petition For Writ of Certiorari to the Nebraska Supreme Court at 8, *Franco*, 1999 WL 33640379 (Sept. 21, 1999) (No. 99-497) (available in the Schmid Law Library at the University of Nebraska College of Law).

59. *See* State v. Two IGT Video Poker Games, 237 Neb. 145, 146, 465 N.W.2d 453, 456 (1991) (holding that a statute codified within the criminal code that authorized forfeitures of gambling items was civil in nature).

60. 465 U.S. 354 (1984).

61. *Id.* at 364 n.6.

62. *Id.* at 363–66.

63. United States v. Ursery, 518 U.S. 267, 288 (1996) (quoting United States. v. One Assortment of 89 Firearms, 465 U.S. 354, 363 (1984)).

64. *See id.* at 288–89.

ute) contains a provision that places the burden of proof squarely upon the claimant to establish

> by a preponderance of the evidence that he or she (a) has not used or intended to use the property to facilitate an offense in violation of [the statute], (b) has an interest in such property as owner or lienor or otherwise, acquired by him or her in good faith, and (c) at no time had any knowledge that such property was being or would be used in, or to facilitate, the violation [of the statute].[65]

As section 28-431 indicates, if the claimant cannot meet this burden, the property will not be returned, regardless of whether the State is able to meet its own burden of proof.[66] By placing separate burdens of proof upon both the State and the claimant, the procedural mechanisms of section 28-431 cannot fairly be viewed as consistent with a criminal forfeiture statute.

Instead of reviewing section 28-431 in light of the burden of proof it places upon both parties, the *Franco* court chose to focus exclusively upon the State's own burden to prove its case beyond a reasonable doubt as evidence that the legislature intended the statute to be criminal.[67] Although such a high burden of proof is normally reserved for criminal statutes, the *Franco* court was mistaken to rely upon this requirement as conclusive evidence of the legislature's intent. Since civil forfeiture proceedings are quasi-criminal in nature,[68] several states have chosen to require a higher burden of proof than normally is required in civil proceedings.[69] Other states besides Nebraska have

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65. NEB. REV. STAT. § 28-431(4) (Reissue 1995 & Cum. Supp. 2004). This type of provision has been labeled an "innocent owner's defense" by legal commentators. *See* Hadaway, *supra* note 9, at 107–08.

66. *See* NEB. REV. STAT. § 28-431(4). This rather awkward provision of the statute was perplexing to the county attorneys who brought forfeiture proceedings prior to the *Franco* decision. As the statute was interpreted by the lower courts, a claimant has to meet the burden of proof in order to have the property returned, but the State also has to meet its own burden of proof (beyond a reasonable doubt) to succeed in the forfeiture proceeding. *Id.* If neither the claimant nor the State was able to meet their respective burdens of proof, the property would continue to be held by the court for a period of time to ensure there were no other claims to the property, and then the property would eventually be placed within the State's general fund like all other unclaimed property. Interview with Patrick Condon, Deputy Lancaster County Attorney, in Lincoln, Neb. (Oct. 28, 2004).

67. *See* State v. Franco, 257 Neb. 15, 23, 594 N.W.2d 633, 639 (1999).

68. *See* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 697 (1965) (citing Austin v. United States, 509 U.S. 602, 618 (1993); Boyd v. United States, 116 U.S. 616, 633–34 (1886)).

69. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 11,488.4(i)(1)–(2) (West 2004) (requiring proof beyond a reasonable doubt for real property and personal property valued at not less than $25,000 for civil forfeiture proceedings); N.Y. C.P.L.R. § 1311(1)(b) (McKinney 2004) (requiring clear and convincing evidence in New York civil forfeiture proceedings); Dep't of Law Enforcement v. Real Prop., 588 So. 2d 957, 968 (Fla. 1991) (holding that Florida law required clear and convincing evidence in civil forfeiture proceedings); A 1983 Volkswagen v. County of Washoe, 699 P.2d 108, 109 (Nev. 1985) (holding that, for civil forfeiture actions in Nevada, "[p]roof beyond a reasonable doubt is appropriate in order that the inno-

placed the burden of proof at beyond a reasonable doubt,[70] presumably in order to eliminate an incentive for the prosecution to choose forfeiture proceedings over filing criminal charges.[71] The Nebraska Supreme Court itself has recognized that certain civil proceedings that contain quasi-criminal sanctions, such as civil contempt hearings, should require proof beyond a reasonable doubt.[72] It is understandable, given the nature of civil forfeiture proceedings, that the Nebraska Legislature would choose to heighten the State's burden of proof as a matter of public policy rather than with the intent of creating an additional criminal sanction.

The legislative history surrounding the enactment and subsequent amendment of section 28-431 provides additional evidence that the legislature intended to create civil forfeiture proceedings. In 1980, when section 28-431 was amended to include drug paraphernalia in the class of property subject to forfeiture under the statute, Senator Nichol stated: "[T]he final committee amendment is a technical amendment which plugs into *the civil forfeiture* sections of our ex-

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cent not be permanently deprived of their property."). *See also* H.R. REP. NO. 106-192, at 11–12 (1999) (advocating a "clear and convincing" evidence standard for civil forfeiture proceedings), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_reports&docid=f:hr192.106.pdf; John H. Hingson III, *A Cry for Reform: Revamping the Government's Power to Seize*, CONN. L. TRIB., May 16, 1994, at 25, 30 (advocating for a higher standard of proof in forfeiture actions than is required under typical civil proceedings).

70. *See, e.g.*, People v. $9,632.50 United States Currency, 75 Cal. Rptr. 2d 125, 128 (1998) (discussing California's forfeiture statute, CAL. HEALTH & SAFETY CODE § 11,488.4(i)(1) (West 2004), which entitles property claimants to a jury finding of forfeitability beyond a reasonable doubt in certain cases).

71. *See, e.g.*, Rick Fueyo, *Normative Considerations of Asset Forfeiture Under the Drug Abuse Control Act—Who Will Protect the People?—The Judiciary as Vox Populi*, 7 U. FLA. J.L. & PUB. POL'Y 143, 186 (1994–1995) (arguing for a higher burden of proof in forfeiture proceedings because these proceedings "pit the power of the . . . government against the individual"); Nkechi Taifa, *Civil Forfeiture vs. Civil Liberties*, 39 N.Y.L. SCH. L. REV. 95, 116 (1994) (reasoning that "[i]f the property owner is truly involved in criminal activity to an extent that would justify forfeiture of the property, the government should be able to prove the criminal culpability beyond a reasonable doubt"); Robin M. Sackett, Comment, *The Impact of* Austin v. United States*: Extending Constitutional Protections to Claimants in Civil Forfeiture Proceedings*, 24 GOLDEN GATE U. L. REV. 495, 520–21 (1994) (arguing that a higher standard of proof in forfeiture proceedings is necessary to remove the incentive for law enforcement to pursue forfeitures instead of criminal convictions). *But see* George Fishman, *Civil Asset Forfeiture Reform: The Agenda Before Congress*, 39 N.Y.L. SCH. L. REV. 121, 130 (1994) (noting that, if the beyond a reasonable doubt standard could be met by the State, then it would be simpler for the State to just convict the claimant in a criminal trial and seize his assets via a criminal forfeiture proceeding).

72. *See* NEB. REV. STAT. § 25-2121 (Reissue 1995); Dunning v. Tallman, 244 Neb. 1, 6–7, 504 N.W.2d 85, 90 (1993); State *ex rel.* Kandt v. North Platte Baptist Church, 225 Neb. 657, 407 N.W.2d 747 (1987); *In re* Contempt of Liles, 217 Neb. 414, 349 N.W.2d 377 (1984).

isting law. These amendments will provide direction to the courts to dispose of drug paraphernalia which has been *civilly forfeited*."[73] Prior versions of section 28-431 also reflect the legislature's intent that it be a civil forfeiture statute. For instance, the 1977 version of the statute stated: "The answer or demurrer shall allege the interest or liability of the party filing it. In all other respects the issue shall be made up *as in other civil actions*."[74]

The most compelling evidence that section 28-431 was intended to create civil forfeiture proceedings is that, if the statute is construed to be a criminal forfeiture provision, criminal charges for narcotics possession cannot possibly be brought concurrently with forfeiture proceedings. If the Nebraska Supreme Court was correct that the legislature intended section 28-431 to create a criminal forfeiture proceeding, then it follows that the legislature would have anticipated situations where a defendant was being tried for narcotics possession while having his property forfeited (such as Juan Franco Jr.). Presumably, the legislature would have drafted the statute's procedural requirements with these situations in mind. Instead, section 28-431 requires that forfeiture proceedings be brought within ten days of confiscating the property.[75] This means that, for a narcotics possession charge to be brought against a defendant at the same time, the county attorneys would not only have to charge the defendant, but also be completely ready for trial within ten days. As a practical matter, such a procedure would be untenable,[76] especially in larger narcotics cases where it would take county attorneys significant time to prepare for trial. Other criminal procedural statutes demonstrate the absurdity of this ten-day-trial requirement. These statutes grant county attorneys significantly more time than ten days to charge defendants and bring them to trial.[77] The Nebraska Supreme Court has often stated that "[i]t is a mark of statutory interpretation that in construing a statute the . . . Court will presume that the Legislature intended a

73. *Floor Debate on L.B. 991*, 86th Leg., 2nd Sess. 9930 (Neb. 1980) (emphasis added); Petition For Writ of Certiorari to the Nebraska Supreme Court at 8, *Franco*, 1999 WL 33640379 (Sept. 21, 1999) (No. 99-497) (available in the Schmid Law Library at the University of Nebraska College of Law).

74. NEB. REV. STAT. § 28-431 (Reissue 1979) (emphasis added); Petition For Writ of Certiorari to the Nebraska Supreme Court at 8, 1999 WL 33640379 (Sept. 21, 1999) (No. 99-497) (available in the Schmid Law Library at the University of Nebraska College of Law).

75. NEB. REV. STAT. § 28-431(4) (Cum. Supp. 2004).

76. Interview with Patrick Condon, Deputy Lancaster County Attorney, in Lincoln, Neb. (Oct. 14, 2004).

77. *See* NEB. REV. STAT. § 29-1207 (Reissue 1995) (requiring the county attorneys to bring a criminal defendant to trial within six months after being indicted); *Id.* § 29-110 (requiring county attorneys to charge a defendant for a crime within three years of the incident for a felony and within eighteen months of the incident for a misdemeanor).

sensible rather than an absurd result."[78] Following this principle of statutory construction, the *Franco* court should have construed section 28-431 to avoid the "absurd result" of assuming the legislature intended to create a criminal forfeiture statute with an unworkable procedure.

Evidence of how section 28-431 has fallen into disuse after *Franco* also demonstrates that the statute's procedural mechanisms were not meant to be applied to criminal forfeiture proceedings. According to the Deputy Lancaster County Attorney who was responsible for bringing forfeiture proceedings prior to *Franco*, section 28-431 practically never is used anymore by any county attorney, and it is the policy of Lancaster County not to bring a forfeiture action under the statute when a conviction for narcotics possession is also being sought.[79] He explained that this is because the procedural requirements of the statute as it was written make it almost entirely incompatible with the Double Jeopardy requirement for multiple punishments to be brought within the same proceeding.[80]

The Nebraska Supreme Court has observed that, "when a statute is constitutionally suspect, we endeavor to interpret it in a manner consistent with the Constitution."[81] As this analysis of the *Franco* decision has indicated, the *Franco* court had sufficient evidence to construe section 28-431 in a way that avoided violating the Double Jeopardy Clause. Rather than avoiding an unconstitutional interpretation, however, it appears that the *Franco* court interpreted the statute so as to place it on a collision course with the Double Jeopardy Clause.

B. *Franco*'s Legacy: Federal Adoption

The Nebraska Supreme Court's holding in *State v. Franco* dramatically altered the way forfeiture proceedings could be brought under Nebraska law. By labeling section 28-431 as a criminal sanction and requiring forfeitures under the statute and criminal charges to be brought in a single, bifurcated proceeding, the *Franco* court effectively wiped the statute off the books.[82] As the story of Jacob King indicates, however, the court's decision did not necessarily have the effect of eliminating forfeiture proceedings within the state. Since *State v. Franco*, Nebraska law enforcement has been relying exclusively upon

78. State v. Sinica, 220 Neb. 792, 798, 372 N.W.2d 445, 449 (1985) (citing Reed v. McClow, 205 Neb. 739, 744, 290 N.W.2d 186, 189 (1980)).
79. Interview with Patrick Condon, *supra* note 76.
80. *Id.* *See supra* notes 75–77 and accompanying text.
81. *Sinica*, 220 Neb. at 798, 372 N.W.2d at 449.
82. Interview with Patrick Condon, *supra* note 76 (stating that forfeitures are rarely brought under section 28-431 after *State v. Franco* and not at all in Lancaster County when criminal narcotics charges are also being sought).

a process known as "federal adoption" to seize suspected drug-related assets.

Federal adoption (or "equitable sharing" as it is called in the federal regulations) was implemented during the 1984 amendments to the federal forfeiture statutes with the stated purpose of encouraging cooperation among federal and local law enforcement officials.[83] It is essentially a process where local law enforcement agencies confiscate drug-related assets and turn those assets over to the United States Attorney.[84] The United States Attorney then brings forfeiture proceedings under the federal forfeiture statute.[85] After the United States receives the forfeited property, eighty percent of the proceeds are returned directly to the local law enforcement agency that made the forfeiture, while the remaining twenty percent of the proceeds are kept by the Department of Justice.[86]

The most troubling aspect of the federal adoption system is that it effectively allows local law enforcement officials to circumvent state law.[87] In Missouri, for example, the state constitution requires that all proceeds received from drug-related forfeitures must be used solely for the benefit of the state's public schools.[88] Early in the 1990s, Missouri's law enforcement willfully began to ignore this constitutional requirement by turning over drug-related assets to the United States Attorney.[89] Since federal law requires that all proceeds returned through federal adoption be given directly to the local law enforcement agency that participated in the seizure of those funds, the state law enforcement officials were able to violate the Missouri constitutional requirement with impunity.[90] In response, the Missouri State Legislature amended its forfeiture statute in 1993 to require the order of a state court judge before local law enforcement officials could turn over assets for federal adoption.[91]

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83. John Biewen, *Asset Forfeiture* (NPR radio broadcast, Apr. 27, 2002), *available at* http://www.npr.org/templates/story/story.php?storyId=1142459; *see also* U.S. DEP'T OF JUSTICE, *Guide to Equitable Sharing of Federally Forfeited Property for State and Local Law Enforcement Agencies*, *in* DOJ ASSET FORFEITURE MANUAL 8–9 (Mar. 1994), *available at* http://www.usdoj.gov/criminal/publicdocs/11-1prior/crm06.pdf.

84. Karis Ann-Yu Chi, Comment, *Follow the Money: Getting to the Root of the Problem with Civil Asset Forfeiture in California*, 90 CAL. L. REV. 1635, 1662–64 (2002).

85. *Id.*

86. *Id.*

87. David B. Smith, *New Jersey's Statute Held Unconstitutional: Prosecutors May Not Benefit from Forfeiture Cases*, 27 CHAMPION 12, 13–14 (2003).

88. *See* MO. CONST. art. 9, § 7.

89. *See* Smith, *supra* note 87, at 13–14.

90. *See* 21 U.S.C. § 881(e)(1)(A) (2000).

91. *See* Criminal Activity Forfeiture Act, MO. ANN. STAT. § 513.647 (West 2002). The Missouri statute states in relevant part:

Although this statute helped rein in many of the abuses by Missouri's local law enforcement, some law enforcement officials continued to circumvent the statute by utilizing tactics such as calling the Federal Drug Enforcement Agency ("DEA") after discovering drug-related property and then having that agency make the arrest.[92] As Judge Loken stated in his concurring opinion in a case where this tactic was used, "[b]y summoning a DEA agent and then pretending DEA made the seizure, the DEA and Highway Patrol officers successfully conspired to violate the Missouri Constitution, . . . the Missouri Revised Code, and a Missouri Supreme Court decision."[93] Judge Loken also questioned whether the adoption provision was allowing federal agencies to "us[e] their extensive forfeiture powers to frustrate the fiscal policy of states such as Missouri."[94]

Judge Loken's concerns about the inequity of the "equitable sharing program" have been shared by numerous legal commentators.[95] Since the start of the federal adoption program in 1984, other states besides Missouri have taken issue with having their law enforcement officials circumvent state laws that allocate proceeds from forfeitures to programs such as public schools.[96] As the legislatures of these

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> No state or local law enforcement agency may transfer any property seized by the state or local agency to any federal agency for forfeiture under federal law until the prosecuting attorney and the circuit judge of the county in which the property was seized first review the seizure and approve the transfer to a federal agency, regardless of the identity of the seizing agency. The prosecuting attorney and the circuit judge shall not approve any transfer unless it reasonably appears the activity giving rise to the investigation or seizure involves more than one state or unless it is reasonably likely to result in federal criminal charges being filed, based upon a written statement of intent to prosecute from the United States attorney with jurisdiction. No transfer shall be made to a federal agency unless the violation would be a felony under Missouri law or federal law.

Id.

92. *See* Steffanie Stracke, Comment, *The Criminal Activity Forfeiture Act: Replete with Constitutional Violations*, 57 MO. L. REV. 909, 917 (1992); Martin Connolly, *Reardon Often Avoids Forfeiture Statutes*, KAN. CITY STAR, Oct. 3, 1993, at A10; Karen Dillon & Bob Lynn, *KC Police Have Kept Money Due Schools*, KAN. CITY STAR, Oct. 19, 1996, at A1; Louis J. Rose & Tim Poor, *Seizure After Loud Party Took Man's Computer, Stereo, TV*, ST. LOUIS POST-DISPATCH, May 3, 1991, at 1A; Virginia Young, *Schools Hail Ruling on Drug Assets*, ST. LOUIS POST-DISPATCH, November 28, 1990, at 1A.

93. *In re* U.S. Currency, $844,520.00, 136 F.3d 581, 583 (8th Cir. 1998) (Loken, J., concurring).

94. *Id.* at 582.

95. *See* Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 44–46 (1998); Michael J. Duffy, *A Drug War Funded With Drug Money: The Federal Civil Forfeiture Statute and Federalism*, 34 SUFFOLK U. L. REV. 511, 535–40 (2001); Ann-Yu Chi, *supra* note 84, at 1645–49; Hadaway, *supra* note 9, at 92–96; Solomon, *supra* note 12, at 1173–80.

96. DAVID W. RASMUSSEN & BRUCE L. BENSON, THE ECONOMIC ANATOMY OF A DRUG WAR: CRIMINAL JUSTICE IN THE COMMONS 133–36 (1994) (explaining the attempt

states started to recognize how the federal law was hindering their ability to distribute forfeiture assets as they saw fit, these states lobbied Congress to amend the law.[97] The states were initially successful. Section 6077 of the Anti-Drug Abuse Act of 1988 amended the federal adoption provisions to require the Attorney General to ensure that assets transferred from local to federal law enforcement are "not so transferred to circumvent any requirement of State law that prohibits forfeiture or limits use or disposition of property forfeited to State or local agencies."[98] This amendment was scheduled to go into effect on October 1, 1989, and would have prohibited the use of federal adoption practices that violated state law. Unfortunately, an intensive lobby of both state and federal law enforcement officials was able to convince Congress to repeal this amendment before its effective date.[99] The amendment's repeal was buried in the 1990 Defense Appropriations Bill.[100]

As disconcerting as the repeal of this amendment was to the state legislatures that lobbied for its passage, the reasoning given by law enforcement representatives who lobbied for the amendment's repeal was nothing short of shocking. Law enforcement representatives lobbying to repeal the amendment to the federal adoption procedure candidly admitted that the procedure was necessary in order to allow them to circumvent their states' constitutional provisions.[101] For instance, Joseph W. Dean, the representative on behalf of the North Carolina Department of Crime Control and Public Safety, offered this explanation to the U.S. House Subcommittee on Crime:

> The education lobby is the most powerful in the state [of North Carolina] and has taken a position against law enforcement being able to share in seized assets. The irony is that if local and state law enforcement agencies cannot share, the assets will in all likelihood not be seized and forfeited. . . . If this financial sharing stops, we will kill the goose that laid the golden egg.[102]

As these remarks illustrate, the federal adoption statute has had the collateral effect of turning state agencies against each other—all for control of money. The situation described in Joseph Dean's testimony—a state's own law enforcement going against a state law in order to receive money allocated to the public schools—is exactly what has been happening in Nebraska in the six years since *Franco*.

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to amend the federal adoption provision by states whose laws allocated forfeiture assets to other agencies).

97. *Id.*

98. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6077(a)(3)(B), 102 Stat. 4181, 4325 (amending 21 U.S.C. § 881(e)).

99. RASMUSSEN & BENSON, *supra* note 96, at 134.

100. *Id.*

101. *Id.*

102. *Id.* at 135.

Besides giving local law enforcement the incentive and the means to circumvent state law, federal adoption allows local law enforcement to receive eighty percent of the proceeds they confiscate with minimal requirements on how those proceeds are to be spent. While the adoption program requires the proceeds received by law enforcement to be used exclusively for law enforcement purposes,[103] the adoption statute provides little guidance on what law enforcement purposes are legitimate.[104] In fact, the Department of Justice guidelines on how asset forfeitures can be used specifically allow law enforcement officials to spend adoption proceeds for such purposes as "payment of overtime for officers and investigators; payment of the first year's salaries for new law enforcement positions that supplement the workforce; payment for temporary or not-to-exceed-one-year appointments; payments to informants; 'buy,' 'flash,' or reward money; and the purchase of evidence."[105]

Allowing such broad discretion on how a local law enforcement agency may spend potentially vast sums of money has led to some rather incredulous results. A rather extreme example illustrates this point. A small police station in the town of Little Compton, Rhode Island, played a relatively minor role in breaking up an international hashish ring in the early 1990s. After turning the proceeds over to the federal government for forfeiture through the federal adoption program, the department earned over $80 million from seized assets.[106] In order to spend the money for "law enforcement purposes," the small department (consisting of seven officers and an annual budget of $1.8 million) purchased new squad cars outfitted with video cameras and body-heat detection devices, constructed an indoor–outdoor firing range, sent three officers to earn college degrees, installed a computer telephone network, put police radios in school buses, and hired a local to wash the police cars and wax the floor of the police station every morning.[107] The department also rationalized such "law enforcement expenditures" as buying new parking signs (a pubic-safety expense); buying the city treasurer a new computer (for tracking the police department's sizeable assets); and purchasing fireworks for the town's

103. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S GUIDELINES ON SEIZED AND FORFEITED PROPERTY 7 (July 1990), *available at* http://www.usdoj.gov/criminal/publicdocs/11-1prior/crm05.pdf.

104. U.S. DEP'T OF JUSTICE, *supra* note 83, at 8–9. *See also* Solomon, *supra* note 12, at 1176–79 (arguing that the guidelines on how forfeiture proceeds are to be spent by local law enforcement agencies are vague and lead to confusion over what law enforcement purposes are truly legitimate).

105. U.S. DEP'T OF JUSTICE, *supra* note 83, at 10.

106. Steve Stecklow, *Big Money for a Tiny Police Force*, PHIL. INQ., Aug. 24, 1992, at A1 (available in the Schmid Law Library at the University of Nebraska College of Law).

107. *Id.*

Fourth of July celebration (to prevent the department from receiving complaints from kids setting off fireworks of their own around town).[108] However, the Little Compton police chief drew the line when the city requested to use the police department's funds to build a new fire department.[109]

The story of Little Compton demonstrates another problem inherent with federal adoption. As several legal commentators have suggested, the incentives—created for local law enforcement to directly benefit from asset forfeitures through federal adoption—almost inevitably lead to a conflict between economic self-interest and traditional law enforcement objectives.[110] Such a conflict of interest taints the image of the law enforcement agency and promotes overzealous law enforcement practices, such as illegal searches,[111] unnecessary uses of force,[112] and racial profiling.[113] As these commentators suggest, the only meaningful reform to such a program would be to eliminate law enforcement's direct economic incentive and ensure that forfeiture proceeds are controlled by an independent agency and not placed di-

108. *Id.*

109. *Id.* at 3. Little Compton's struggle for control over how forfeiture funds could be spent was eventually settled in state court. *See* Hayes v. Souther, 1992 WL 813638 (R.I. Super. 1992). The Rhode Island Superior Court concluded that a Little Compton city ordinance allowed taxpayers to vote upon the City's proposed plan for spending the forfeiture funds. *Id.* at *2. However, the court also concluded that the ultimate decision for how the forfeiture funds would be used was subject to approval by the United States Attorney. *Id.*

110. *See* Blumenson & Nilsen, *supra* note 95, at 44–46; Duffy, *supra* note 95, at 535–40; Ann-Yu Chi, *supra* note 84, at 1645–49; Hadaway, *supra* note 9, at 92–96; Solomon, *supra* note 12, at 1173–80. *See also* Biewen, *supra* note 83 (reporting on how creating an economic incentive to seek forfeitures affects law enforcement practices).

111. Mark J. Crandley, *A Plymouth, a Parolee, and the Police: The Case for the Exclusionary Rule in Civil Forfeiture After* Pennsylvania Board of Probation and Parole v. Scott, 65 ALB. L. REV. 147, 160–65 (2001) (arguing that the economic incentive behind forfeitures leads to illegal searches from law enforcement in an effort to seize property).

112. *See* Duffy, *supra* note 95, at 511 (introducing the story of Donald Scott, who was killed in a law enforcement raid of his 200-acre property, initiated with the purpose of finding marijuana plants that would allow the property to be forfeited).

113. Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 TUL. L. REV. 1409, 1420–22 (2000) (arguing that the economic incentive to confiscate drug money leads to a disproportionate seizure of assets from minorities on the assumption that minorities with large amounts of money must be drug dealers); Biewen, *supra* note 83. Jacob King's own story provides further evidence of how, even in Nebraska, racial profiling and asset forfeitures go hand-in-hand. *See supra* notes 1, 2 and accompanying text. *See also* Butch Mabin, *Patrol Acknowledges Race Profiling*, LINCOLN J. STAR, Aug. 27, 2004, at 1A (documenting the Nebraska State Patrol's internal investigations into racial profiling).

rectly into the hands of the agents responsible for enforcing the very laws from which they are profiting.[114]

In Nebraska, forfeitures pursuant to federal adoption have increased dramatically since the *Franco* court effectively nullified Nebraska's forfeiture statute.[115] In Lancaster County, for example, nearly all drug-related assets seized by local law enforcement are turned over to the federal authorities.[116] With eighty percent of the forfeiture proceeds going directly to the law enforcement agencies, as opposed to only fifty percent under the state system, it is no surprise that Nebraska's law enforcement did not lobby the state legislature to amend section 28-431 after the *Franco* decision.[117] Whatever the Nebraska Supreme Court's intent was when it decided *Franco*, the ultimate effect was to replace a forfeiture system that had significant procedural safeguards for property owners, while benefiting both the public schools and local law enforcement, with a system that offered few procedural protections and allowed no state control over assets

114. Blumenson & Nilsen, *supra* note 95, at 110–12; Hadaway, *supra* note 9, at 105. *See also* Biewen, *supra* note 83 (discussing the option of placing forfeiture assets in a state's general fund instead of allowing it to go to the seizing law enforcement agency).

115. In the year after the *Franco* decision, for example, forfeiture proceeds adopted by the state under the federal system nearly tripled. *Compare* U.S. DEP'T OF JUSTICE, ASSET FORFEITURE PROGRAM, ANN. REP. (1999) (reporting equitable sharing payments for Nebraska at $1,025,731), *available at* http://www.usdoj.gov/jmd/afp/02fundreport/FY1999AFPLinks.htm, *with* U.S. DEP'T OF JUSTICE, ASSET FORFEITURE PROGRAM, ANN. REP. (2000) (reporting equitable sharing payments for Nebraska at $2,889,867), *available at* http://www.usdoj.gov/jmd/afp/02fundreport/FY2000AFPLinks.htm.

116. Interview with Patrick Condon, *supra* note 76. The only exception to this general policy is when property owners were being prosecuted for drug charges under federal law. In these rare cases, Lancaster County Attorneys were still able to utilize section 28-431, because a criminal conviction was not being sought under state law. *Id.*

117. The division of these forfeiture proceeds among local law enforcement agencies demonstrates another flaw in the federal adoption program. The Nebraska State Patrol typically receives the lion's share of forfeiture proceeds, since it is the agency that confiscates the majority of drug-related assets. In 2004, for example, of the $3,337,864 that was distributed through the federal adoption program, over half of the proceeds ($1,852,220) were distributed directly to the State Patrol. U.S. DEP'T OF JUSTICE, ASSET FORFEITURE PROGRAM, ANN. REP. (2004), *available at* http://www.usdoj.gov/jmd/afp/02fundreport/2004affr/states/nebraska.htm. The problem with this distribution scheme is that the State Patrol is specifically funded for its drug law enforcement by the Nebraska State Legislature, and funds that it receives through federal adoption are being taken away from smaller county law enforcement agencies. It was for this reason that the State Patrol was specifically excluded under Nebraska's forfeiture statute when it was first enacted. *See Hearing on L.B. 247*, *supra* note 35 (statement of Senator Carol McBride-Pirsch, co-sponsor of LB 247) (explaining the purpose of excluding the State Patrol from receiving forfeiture proceeds under the proposed state forfeiture law).

that were confiscated by the state's own law enforcement.[118] Under such a system, Nebraska's law enforcement may win, but everyone else loses.[119]

C. A Proposal for Reform

In 1984, the citizens of Nebraska voted to approve the state constitutional amendment that would allow forfeiture proceeds to be divided equally between the state's law enforcement and the state's schools.[120] Today, that command has been cast aside, not only because of the *Franco* decision, but also by the subsequent inaction of the state's legislature. As a result of this inaction, Nebraska's schools have lost badly needed funds to which they are entitled under the Nebraska Constitution.[121] Countless property owners such as Jacob King have been thrown into a forfeiture system that lacks the procedural safeguards the Nebraska Legislature intended property owners in this state to have. Finally, Nebraska's own law enforcement agencies have been harmed through the inequitable distribution of forfeiture assets under federal adoption.[122] Fortunately, the legislative body that created many of these problems also has the power to correct them, simply by amending Nebraska's forfeiture statute.

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118. The federal civil forfeiture procedures were amended extensively by Congress in 2000 in response to widespread criticism. The burden of proof on the government was raised from probable cause to a preponderance of the evidence, an innocent owner's defense was provided for in all forfeiture statutes, and indigent criminal defendants may be allowed representation of counsel in concurrent forfeiture proceedings. *See* Hadaway, *supra* note 9, at 102–05. However, even with these improvements, the statutes still fail to address the issue critical to many legal commentators: direct control of law enforcement over forfeiture proceeds. *See id.* at 105; *see also* Blumenson & Nilsen, *supra* note 95, at 40–56; Duffy, *supra* note 95, at 535–45; Ann-Yu Chi, *supra* note 84, at 145–55. Nebraska's county drug law enforcement boards were able to provide that critical buffer between law enforcement, and the money they confiscated.

119. Again, it is important to note that certain law enforcement agencies benefit far more than others under the federal adoption program. *See supra* note 117. The intent of the Nebraska forfeiture statute was to encourage cooperation and asset distribution among county law enforcement agencies through the County drug enforcement boards. *See* NEB. REV. STAT. § 28-1439.03 (Reissue 1995). Under the federal system, however, the law enforcement agency that turns funds over for federal adoption has the exclusive right to utilize those proceeds for its own "law enforcement purposes." *See* U.S. DEP'T OF JUSTICE, *supra* note 103, at 7.

120. NEB. CONST. art. VII, § 5.

121. One only has to pick up a local newspaper to read about how Nebraska's schools have been affected by budget cuts. *See, e.g.*, Scott Bauer, *Small Schools Fight Latest Consolidation Efforts*, LINCOLN J. STAR, Feb. 12, 2005, at 1A; Nate Jenkins, *School Bill Advances on Deal-Making*, LINCOLN J. STAR, Feb. 16, 2005, at 1A; Barbara Nordby, *Supreme Court Hears School Aid Case*, LINCOLN J. STAR, Feb. 1, 2005, at 1A; University of Nebraska Public Policy Center, *Discussing Lincoln's Future: Schools and Growth*, LINCOLN J. STAR, Feb. 6, 2005, at 1A.

122. *See supra* notes 117, 119.

1. Superseding Franco

In order to address many of the concerns outlined in this Note, section 28-431 would have to be amended in several ways. The easiest task would be for the Nebraska Legislature to supersede *State v. Franco* by expressing the clear legislative intent that forfeitures brought under section 28-431 are civil, *in rem* proceedings, and that such proceedings are meant largely to emulate forfeiture proceedings under federal law. Several states have expressed this clear legislative intent by prefacing their forfeiture statutes with a declaration of the intent to create a civil forfeiture procedure.[123] Amending section 28-431 to include such a declaration would be sufficient to overcome the first prong of the two-prong test utilized by the Nebraska Supreme Court in *Franco*. Additionally, since the Nebraska Supreme Court has indicated that Nebraska's Double Jeopardy Clause offers concurrent protections with the federal Double Jeopardy Clause,[124] the U.S. Supreme Court's holding in *Ursery* should foreclose a finding by the Nebraska Supreme Court that section 28-431 is "so punitive in form and effect as to render [the statute] criminal despite [the legislature's] intent to the contrary."[125]

2. Limiting Federal Adoption

The Nebraska Legislature also has the power to limit the practice of federal adoption by adding a provision to section 28-431 that grants the state courts *in rem* jurisdiction over all property seized by state law enforcement officers.[126] Other states have drafted their forfeiture

123. The clearest example of expressed legislative intent comes from the Illinois forfeiture statute, 725 ILL. COMP. STAT. 150/1 § 2 (West 1993).

124. State v. Franco, 257 Neb. 15, 20, 594 N.W.2d 633, 637–38 (1999).

125. United States v. Ursery, 518 U.S. 267, 290 (1996). *See also* Adam C. Wells, Comment, *Multiple-Punishment & the Double Jeopardy Clause: The* United States v. Ursery *Decision*, 71 ST. JOHN'S L. REV. 153, 170 (1997) (indicating that, under the two-prong test used in *Ursery*, "the clearest proof" is required to second guess legislative intent, and that intent will typically prevail except in the most egregiously punitive circumstances). *Contra* State v. Nunez, 2 P.3d 264, 272–73 (N.M. 1999) (rejecting *Ursery*'s two-prong test on the ground that the state's Double Jeopardy Clause provided greater protection than the federal clause).

126. *See, e.g.*, Scarabin v. DEA, 966 F.2d 989 (5th Cir. 1992) (holding that the DEA lacked *in rem* jurisdiction over the property, even though it had physical control over money seized by the sheriff's department, because under Louisiana law, the state district court had exclusive control over the property by virtue of issuing the search warrant); United States v. $490,020 in United States Currency, 911 F. Supp. 720 (S.D.N.Y. 1996) (noting that under New York forfeiture statutes, the issuing of search warrants provides the state with *in rem* jurisdiction, and bars U.S. Attorney from instituting forfeiture proceedings without a turnover order from state court). *Contra* State v. Wetherbee, 86 A.2d 527 (Vt. 2004) (holding that where the state does not have a statutory scheme granting the state courts *in rem* jurisdiction, federal law enforcement may subsequently seize property and institute federal forfeiture actions).

statutes in this way to give their courts exclusive jurisdiction over the property seized by their own law enforcement agencies.[127] The effectiveness of these statutes is based upon the basic jurisdictional principle announced by the Supreme Court in *Penn General Casualty Co. v. Pennsylvania*[128] that "the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other."[129] By declaring state court jurisdiction over property seized by local law enforcement, the Nebraska Legislature could then limit the turnover of assets under the equitable sharing program to those situations where seizures truly are made as a result of joint operations between state and federal law enforcement, instead of continuing to turn over assets to the federal government in those situations where seizures are made by the sole efforts of local law enforcement.[130]

The stated purpose of the equitable sharing program is to "enhance cooperation among federal, state, and local law enforcement,"[131] but allowing the adoption of forfeitures made solely by local law enforcement officials is inapposite to such a purpose. The only cooperation that occurs between local and federal law enforcement in these situations is the cooperation to circumvent state law.[132] By limiting the turnover of forfeiture assets to legitimate situations where federal and

127. *See, e.g.*, ARK. CODE ANN. § 5-64-505(d) (Michie 1997); CAL. PENAL CODE § 1536 (West 2000); 725 ILL. COMP. STAT. 150/9(J) (West 2002) (discussing concurrent jurisdiction between state courts and state attorney); LA. CODE CRIM. PROC. ANN. art. 167 (West 1993); MASS. GEN. LAWS. ANN. ch. 276, § 3 (West 2005); N.Y. CRIM. PROC. §§ 690.05–.55 (McKinney 1995).

128. 294 U.S. 189 (1935).

129. *Id.* at 195. The stated purpose for this jurisdictional rule is to "[t]o avoid unseemly and disastrous conflicts in the administration of our dual judicial system, and to protect the judicial processes of the court first assuming jurisdiction." *Id. See also* Elkins v. United States, 364 U.S. 206, 221 (1960) ("The very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts.").

130. These restrictions are referred to as "turnover orders." Missouri and Utah, for example, have created these turnover order rules in order to require local law enforcement to seek approval from a state court before the court will release seized property from its jurisdiction. MO. STAT. ANN. § 513.647 (West 2002); UTAH CODE ANN. § 24-1-15 (West 2004). Under these turnover order rules, a state court is typically only permitted to authorize transfers if it finds that the activity giving rise to the seizure (1) is a felony under state or federal law and (2) either involves more than one state or is reasonably likely to result in a federal criminal prosecution. *See* MO. STAT. ANN. § 513.647; UTAH CODE ANN. § 24-1-15. If the state court does not release jurisdiction over the seized property, a forfeiture could only be brought under state law.

131. U.S. DEP'T OF JUSTICE, *supra* note 103, at 1.

132. Ann-Yu Chi, *supra* note 84, at 1645–50. Encouraging cooperation between state and federal law enforcement can also be accomplished in broader contexts than asset sharing, such as through the establishment of state-controlled drug-enforcement boards. *See, e.g.*, WIS. STAT. ANN. 961.11, .54 (West 1998).

state authorities are working together, the legislature could ensure that the policy behind the equitable sharing program is not being frustrated, while at the same time adhere to the will of the state's citizens who demonstrated their desire to have forfeited assets shared equally between law enforcement and the public schools.

Limiting the use of federal adoption in this way also would not significantly reduce the law enforcement budget. Federal adoption still would be available in situations where state and federal authorities are truly engaged in joint narcotics operations. Additionally, under the state forfeiture system, one hundred percent of forfeited assets would stay in the State of Nebraska, whereas federal adoption allows the federal government to retain twenty percent of forfeited assets, often without expending significant effort.[133] Although the state system would allow law enforcement to receive only fifty percent of forfeited proceeds, the net benefit would be an increased amount of funds available to Nebraska.[134]

Another important benefit of limiting federal adoption in Nebraska is that this would require law enforcement to utilize the provision of the state forfeiture scheme that allocates fifty percent of seized assets to the county drug law enforcement boards.[135] These agencies were specifically created to allow local control of forfeiture proceeds by officials who would be able to regulate law enforcement expenditures of forfeiture funds.[136] Such a system would alleviate the predominant criticism of legal commentators—that law enforcement officials who have direct control over forfeiture proceeds are likely to have a conflict of interest and engage in overzealous law enforcement in order to increase their own budgets.[137] At the same time, reinstating the county drug boards would lead to more transparency on exactly how forfeiture assets are being spent by local law enforcement agencies in the state.[138] The county drug boards could also encourage unity of effort among the county law enforcement agencies and ensure that forfeiture funds are being shared by the county law enforcement agencies as needed, instead of going solely to the agency that made the seizure.[139]

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133. *See* Ann-Yu Chi, *supra* note 84, at 1645–49.

134. Of course, the most effective way to limit federal adoption and protect the states from having their own law enforcement circumvent state law would be to lobby Congress to amend the federal adoption procedures as it had done once before. *See* RASMUSSEN & BENSON, *supra* note 96, at 133–36; *supra* notes 95–99 and accompanying text. However, as recent history demonstrates, the power of the law enforcement lobby would likely prevent such an amendment from passing at this time. *See supra* notes 99–100 and accompanying text.

135. *See* NEB. CONST. art. VII, § 5(2); NEB. REV. STAT. § 28-1439.03 (Reissue 1995).

136. *See supra* note 35.

137. *See supra* notes 106–09 and accompanying text.

138. *See* NEB. REV. STAT. § 28-1439.03.

139. *See id.* § 28-1439.05.

3. Additional Procedural Protections

To continue offering the citizens of Nebraska greater protections than are allotted under federal law, section 28-431 could also be amended to update the statute with whatever additional procedural protections the legislature sees fit to include. The federal forfeiture statute, for example, was recently amended to include a provision that allows indigent defendants who are subject to both criminal proceedings and concurrent civil forfeiture proceedings to utilize an appointed public defender for both actions.[140] The amendment also grants claimants the opportunity to petition the court for a temporary release of the property pending the final disposition of the forfeiture proceedings in situations where the property owner can demonstrate extreme hardship.[141]

Amending section 28-431 to offer increased procedural protections such as these would not greatly increase the costs of bringing forfeiture proceedings. Granting these protections would also ensure that Nebraska's forfeiture system would continue to offer property owners in this state at least as many protections as are offered in the federal system.

IV. CONCLUSION

For better or worse, civil forfeiture proceedings are here to stay in Nebraska. The choice now for the legislature is to decide who will initiate those forfeiture proceedings and what protections will be provided to the citizens of this state.[142] Used properly, forfeitures can be a powerful weapon in the war on drugs, as well as a benefit to the citizen-taxpayers. Since *State v. Franco*, however, civil forfeiture in Nebraska has become a practice of "passing the buck," where innocent property owners, such as Jacob King, are swept up in a system that encourages overzealous law enforcement and that has no accountabil-

140. *See* Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (codified at 18 U.S.C. § 983); Hadaway, *supra* note 9, at 102–05.

141. 18 U.S.C. § 983(f) (2000); Hadaway, *supra* note 9, at 109–10.

142. In a recent attempt to amend Nebraska's forfeiture statute, Nebraska State Senator Kermit Brashear proposed a bill that would have enacted many of the reforms advocated in this Note. *See* L.B. 538, 99th Leg., 1st Reg. Sess. (Neb. 2005). In its original form, this bill not only would have clarified Nebraska's forfeiture statute to express the clear legislative intent that it create civil forfeiture proceedings, but it also would have added additional procedural protections for property owners. *See id.* These protections included granting indigent property owners the right to proceed *in forma pauperis* when contesting the forfeiture and allowing them the right to appointment of counsel. *Id.* Additionally, this proposed bill would have earmarked a significant portion of forfeiture proceeds for use in funding drug abuse treatment programs. *Id.* Unfortunately, all of these revisions to Nebraska's forfeiture law were stripped from the bill when it was amended in the Judiciary Committee. *See id.* (as amended by AM 1650).

ity to either the state legislature or to the citizens of Nebraska. It is time for the Nebraska Legislature to amend the state's forfeiture statute to protect the expressed intent of the state's citizens who commanded that forfeiture proceeds be divided equally between local law enforcement and the public schools. Only by refining its own forfeiture system can Nebraska ensure that the system will protect the rights of its citizens and reflect the values shared by the citizens of this state. It is time for Nebraska to stop passing the buck.

Jason R. Humke